FOR ARGUMENT

No. 77-444

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

PENN CENTRAL TRANSPORTATION COMPANY, THE NEW YORK AND HARLEM RAILROAD COMPANY, THE 51ST STREET REALTY CORPORATION, UGP PROPERTIES, INC.,
Appellants,

v.

THE CITY OF NEW YORK, *et al.*,
Appellees.

On Appeal from the Court of Appeals of the State of New York

APPELLANTS' REPLY BRIEF

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INTRODUCTION

This reply will focus on one critical issue: Did application of the New York City Landmarks Law to Grand Central Terminal effect a "taking" of Penn Central's property for public use within the meaning of the constitutional guarantees? Neither the appellees nor the supporting *amici curiae* contest Penn Central's assertion in its principal brief (Argument, Section I) that Penn Central had a property interest in

the air rights over Grand Central.[1] Nor do they argue that the "transferable development rights" ("TDRs") made available to Penn Central constitute the just compensation guaranteed by the Due Process Clause (Argument, Section III).[2] In effect, only Penn Central's contention (Argument, Section II) that its property rights have been taken by governmental action remains at issue.

The most significant characteristic of all of the opposing briefs is their wholesale retreat from the opinion of the New York Court of Appeals.[3] That court held that the Landmarks Law was not part of a "general community plan," and that application of the Law to particular pieces of property, such as the Terminal, resembled discriminatory zoning. (J.S.A. 5-6) Nonetheless, the court developed a special rule "for the limited purposes of a landmarking statute." (*Id.* 2-3) It held that Penn Central was not entitled to just compensation because it had failed to "establish that there was no possibility of earning a reasonable return on the privately contributed ingredient of the Terminal's value." (*Id.* 9) In reaching this central conclusion, the court, with no attempt at quantification, eliminated from consideration all value "created by social investment" (*id.* 13) and imputed to the Terminal "much income" from Penn Central's other real estate holdings in the Grand Central area. (*Id.* 9) The court acknowledged that if the City of New York were in better financial condition "preservation of historic landmarks through use of the eminent domain power might be desirable, or even required." (*Id.* 14) The opposing briefs implicitly concede that the foregoing reasoning is fundamentally flawed, and they attempt instead to sustain the result on other grounds.

[1] The briefs of the parties and *amici* will be cited as follows: appellants Penn Central Transportation Company, *et al.*, as "PCTC Br."; appellees City of New York, *et al.*, as "CNY Br."; the United States as "US Br."; the State of New York as "SNY Br."; the State of California as "Cal. Br."; the Committee To Save Grand Central Station, *et al.*, as "Committee Br."; the National Trust for Historic Preservation, *et al.*, as "National Trust Br."

The Pacific Legal Foundation and the Real Estate Board of New York, Inc., filed briefs *amicus curiae* supporting Penn Central's position.

[2] Appellees' contention that if application of the Landmarks Law to Grand Central is unconstitutional, Penn Central is nonetheless entitled to no compensation but only to a declaratory judgment is addressed *infra*, pp. 17-20.

[3] For a detailed demonstration of just how novel the decision below is, *see* Costonis, "The Disparity Issue: A Context for the *Grand Central Terminal* Decision," 91 Harv. L. Rev. 402 (1977).

I. THERE IS NO CONSTITUTIONAL JUSTIFICATION FOR THE TAKING WITHOUT JUST COMPENSATION OF PENN CENTRAL'S PROPERTY INTEREST IN DEVELOPING THE AIR RIGHTS OVER GRAND CENTRAL TERMINAL.

In this section, Penn Central will discuss three matters that are central to the positions of the appellees and *amici*: first, the effort to avoid a "taking" inquiry on the ground that the Landmarks Law is a permissible exercise of governmental power;[4] second, the argument that the Landmarks Law is part of a comprehensive zoning plan and, therefore, not subject to challenge absent a showing that an owner has been deprived of all reasonable use of its property;[5] and third, the contention that even if the Law has been unconstitutionally

[4] CNY Br. 20-25, 36; US Br. 17-25; SNY Br. 11-14; Cal. Br. 4-12; National Trust Br. 13-19; Committee Br. 31-39.

[5] CNY Br. 25-27; US Br. 17-19; National Trust Br. 25-27.

applied, Penn Central is not entitled to compensation but only to a declaration of invalidity.[6] Although these arguments overlap to some extent, they are separable analytically.

A. The Application of the Landmarks Law, Even If a Permissible Exercise of Government Power, Did Effect a Taking of Penn Central's Property Interest.

The appellees and supporting *amici* argue that because the Landmarks Law is a permissible manifestation of the government's undefined "police power," its application to Grand Central does not require just compensation. CNY Br. 20-22; Cal. Br. 4-12; Committee Br. 31-39. In so arguing, they attach unwarranted significance to labels and disregard the substance of the challenged governmental action.

Whether the City's actions are characterized by the legislature, or those defending it, as exercises of the "police power" or of "eminent domain" is not controlling. These conclusions signal not the start of judicial analysis, but its end result. The critical issue here is not the source of power for the Landmarks Law but what its actual effects are. As this Court has previously stated: "The incantation pronounced at the time [of the government's action] is not of controlling importance; our primary concern is with the accomplishment." *Davis* v. *Newton Coal Co.*, 267 U.S. 292, 301 (1925); *cf. Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974).

To acknowledge, as Penn Central has, that the pursuit of cultural objectives such as the preservation of landmarks constitutes a permissible exercise of govern-

[6] CNY Br. 37-39; Cal. Br. 12-23; Committee Br. 55-56.

ment power does not mean, as appellees contend, that the constitutional requirement of just compensation becomes inapplicable. The most comprehensive articulation of the scope and breadth of governmental power to take action designed to improve the quality of life is probably found in *Berman* v. *Parker*, 348 U.S. 22 (1954). The broad declaration of legislative authority and discretion in that case was accompanied by an unqualified assurance that "the rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking." *Id.* at 36. There was no suggestion that corners could be cut if the government purported to exercise this broad power by way of regulation rather than eminent domain. However laudable may be the Government's objective, where that objective is accomplished in a manner that forces "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," the governmental action triggers the protections of the Fifth and Fourteenth Amendments.[7] *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).

[7] The Solicitor General discusses several Federal statutes assertedly relating to historic preservation. US Br. 1a-9a. Significantly, the most important of those provisions authorize the use of Federal funds to compensate owners whose property is burdened or appropriated. Historical and Archeological Preservation Act of 1974, 16 U.S.C. § 469a-1(b); Amtrak Improvement Act of 1974, 49 U.S.C. § 1653(i)(3) and (4); Urban Mass Transportation Act of 1964, 49 U.S.C. § 1602(b).

The statutes demonstrate, at the Federal level, an appreciation that historical preservation should, where appropriate, be accomplished through use of the eminent domain power. The Federal policy thus stands in marked contrast to that adopted by the City of New York.

This Court has pursued several lines of inquiry to decide when governmental action constitutes a "taking" for Due Process Clause purposes. Appellees would focus on only one of those lines; they assert that unless the challenged governmental action wholly destroys the value of the affected property, then there has been no taking that requires just compensation. This narrow and cramped view is not supported by decisions of this Court, and, if adopted, would result in an immeasurable erosion of Due Process Clause protections. Only by analyzing all aspects of challenged governmental action pragmatically and comprehensively can this Court satisfy the "political ethics" required by the Due Process Clause. *United States* v. *Cors,* 337 U.S. 325, 332 (1949).

Diminution-in-value theory. The appellees do not dispute that application of the Landmarks Law has deprived Penn Central of substantial property rights. They argue, however, that because the Law has not eliminated *all* reasonable use of the Terminal property, no taking has occurred. In effect, they would make the diminution-in-value test absolutely dispositive of the "taking" issue. No decision of this Court has so held. Indeed, in *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590 (1962), a case heavily relied upon by the appellees, this Court said explicitly that "[a]lthough a comparison of values before and after is relevant . . ., it is by no means conclusive." *Id.* at 594. This Court has repeatedly held that property had been taken even if not made wholly valueless. *See* PCTC Br. 24-28.

The decision in *Goldblatt* does not, contrary to the contention of the Solicitor General, establish a principle that land-use regulation that serves a substantial public purpose is validated merely by permitting a

reasonable use of the property in question. US Br. 19-20. In that case this Court first inquired whether the challenged regulation had impaired the value of the land owner's property so as to warrant compensation. Only after concluding that "there is no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question," 369 U.S. at 594, did the Court go on to hold that a prohibition of mining could be upheld as within the police power, taking into account that the owner was left with a reasonable use of the property.

The opinion in *Goldblatt* was written by Mr. Justice Clark, who also wrote for a unanimous Court the next Term in *Dugan* v. *Rank,* 372 U.S. 609 (1963). There, this Court held that, in the course of implementing a Federal reclamation project, the United States had effecitvely deprived plaintiffs of certain water rights which they claimed. Characterizing the government's actions as an "[i]nterference with or partial taking" of the water rights claimed, this Court analogized those actions to "interference or partial taking of air space over land," *id.* at 625, such as in *Griggs* v. *Allegheny County,* 369 U.S. 84 (1962). If the claimed water rights were valid, the government would be liable in damages to the claimants.

In short, government action that diminishes the value of property is a sufficient condition for the courts to require payment of just compensation.[8] Such a diminution in value has clearly been demonstrated here.

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[8] In Nectow v. City of Cambridge, 277 U.S. 183 (1928), for instance, a city zoning ordinance was held unconstitutional as applied because of the extent of the property owner's injury and the ordinance's lack of connection to the general welfare.

It is not, however, a necessary condition of compensation that the property's value be reduced virtually to nothing,[9] as *Dugan* v. *Rank, supra,* and other cases demonstrate.[10]

Harm-benefit theory. Penn Central has previously noted Professod Freund's formulation of the test for determining when just compensation is due: If government regulates property because it is useful to the public, it does so by exercising the power of eminent domain; if government regulates property because it is harmful to the public, it does so through the police power. In the former case, just compensation is required, while in the latter it is not. *See* PCTC Br. 32 n. 27. This "harm-benefit" theory has been followed

[9] Appellees dispute Penn Central's treatment of the air rights over Grand Central as a property interest separate from the rights in the Terminal itself. CNY Br. 21. The City makes no effort, however, to refute the numerous authorities cited in support of Penn Central's position on that issue. *See* PCTC Br. 13-16.

If Penn Central is correct in considering the air rights separately, it is entitled to recover just compensation even on appellees' view of the diminution-in-value theory. Appellees agree that the air rights over the Terminal have been completely extinguished.

Penn Central's case does not turn upon whether this Court adopts the phrase "deprivation of air rights" rather than "a restriction on use." The former phrase is used by the court of appeals. (J.S.A. 1) Appellees and the *amici* find the latter more compatible with their contentions. The ultimate question, however, is not how the governmental action is described but whether its objective and impact are such that the resulting cost should be borne by the public or by a private property owner.

[10] If the appellees are correct then the proper test in *Berman* v. *Parker, supra,* (on which they heavily rely) should have been whether the affected property owners there could have earned a reasonable return. This Court obviously did not engage in any such analysis.

in several decisions of this Court. *Goldblatt* v. *Town of Hempstead, supra; Hadacheck* v. *Sebastian,* 239 U.S. 394 (1915); *Mugler* v. *Kansas,* 123 U.S. 623 (1887). Here, the appellees have made it indisputably plain that the application of the Landmarks Law is intended to achieve substantial benefits for the general public; there can be no valid contention that construction of an office building over the Terminal would be harmful to health, safety, or morals.

"Fairness" test. The "fairness" test articulated by Professor Michelman is, in many respects, the scholarly counterpart of the "political ethics" commanded by the Fifth and Fourteenth Amendments. Michelman, "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law," 80 *Harv. L. Rev.* 1165 (1967). *See* PCTC Br. 29-30 n. 25. The central question in this inquiry is one that this Court has posed several times—has the government loaded "upon one individual more than his just share of the burdens of government?"[11] If one individual is overburdened, then the government has acted to take his property, and compensation is required. That is precisely Penn Central's contention here.

Given that there are several tests that might be used, the obvious question is how this Court should apply those tests.[12] Here, Penn Central has suffered a

[11] Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893). Or, as the court said in Just v. Marinette County, 201 N.W. 2d 761, 767 (Wis. 1972), "[t]he loss caused the individual must be weighed to determine if it is more than he should bear."

[12] This Court has suggested other criteria, but those just discussed are most pertinent here. *See* Berger, "A Policy Analysis of the Taking Problem," 49 N.Y.U.L. Rev. 165 (1974).

very substantial economic loss—a loss imposed for the benefit of the general public—and it alone bears that loss. The City has fully accomplished its goal of freezing Grand Central in its present form as effectively as if it had acquired title to the facade and air rights above the Terminal.[13] It is plain, therefore, that Penn Central has satisfied the requirements of all three of the tests. Since meeting the requirements of even one line of analysis is sufficient to be awarded just compensation, the particular circumstances of this case militate even more strongly in support of such a result.

In its principal brief, Penn Central relied heavily on *United States* v. *Causby,* 328 U.S. 256 (1946) and *Griggs* v. *Allegheny County, supra.* These decisions are cogent exemplars of the constitutional analysis just described. Significantly, neither the appellees nor their supporting *amici* have offered any convincing rationale on which *Causby* and *Griggs* can be distinguished. *See* CNY Br. 36; US Br. 23; National Trust Br. 31. This Court has already rejected one attempted ground of distinction (that the City did not physically occupy or invade Penn Central's property) by adopting a practical approach to the effects of governmental action. Since the actual effects of a legal restraint or a physical invasion are the same, they should be treated similarly, as this Court held in *United States* v. *General Motors*

[13] In South Terminal Corp. v. Environmental Protection Agency, 504 F. 2d 646 (1st Cir. 1974) (cited in National Trust Br. 29 n. 37), the court defined as a taking the situation where "a right to use or burden property in a particular and permitted way [is] transferred from the original owner to another person, or to a governmental body." 504 F. 2d at 679. That is exactly what the City did here when it effectively placed the Landmarks Commission in control of Penn Central's air rights. *See also* Denver v. Denver Buick, Inc., 141 Col. 121, 347 P. 2d 919 (1959).

Corp., 323 U.S. 373, 378 (1945).[14] *See* PCTC Br. 28-33. The second attempted distinction (that only a future use by Penn Central is being eliminated) is equally untenable. Prior decisions of this Court long ago made it clear that both present and reasonably expected future uses are protected by the Due Process Clause. *Boom Co.* v. *Patterson,* 98 U.S. 403, 408 (1878). *See* cases cited in PCTC Br. 13-16, 37-38.

Reversing the court below, therefore, requires no shift away from earlier decisions by this Court. A comprehensive and practical analysis of the effect of the City's actions here is entirely consistent with and fully supported by prior decisions of this Court under the Due Process Clause. Indeed, the analysis proposed by Penn Central is in complete accord with that of the Solicitor General: ". . . the appropriate disposition of an argument that a regulation amounts to a taking must depend more on the social and economic realities of a particular situation than on any analysis of words and phrases." US Br. 20. The appellees' test, by contrast, is rigid and unyielding, and would cast aside Mr. Justice Pitney's trenchant observation that "it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking." *United States* v. *Cress,* 243 U.S. 316, 328 (1917). As demonstrated in the next subsection, the "character" of the Landmarks Law's operation here clearly dem-

[14] Professor Michelman has aptly described the limits of the physical-invasion test: It "can never be more than a convenience for identifying *clearly compensable* occasions. It cannot justify dismissal of any occasion as *clearly noncompensable*. Michelman, *supra,* 80 Harv. L. Rev. at 1228 (emphasis in original).

onstrates that the City has taken Penn Central's property for the benefit of the public.[15]

B. As the Court Below Said: "This Is Not a Zoning Case."

The appellees expend considerable effort, CNY Br. 22-27, attempting to circumvent the holding of the Court of Appeals that "[t]his is not a zoning case." (J.S.A. 4) They and the *amici* assert that the Landmarks Law is "a general community plan" to preserve landmarks. CNY Br. 25-26. On this basis, they attempt to analogize the Landmarks Law to comprehensive zoning ordinances, the general constitutionality of which has been upheld. *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926). In effect, they are asking this Court to substitute its judgment about the nature of the Landmarks Law for that of the highest court of New York. The court below construed the statute as a matter of State law. In such circumstances, this Court normally defers to the construction of the state court, and it should do so here as well.

Labeling the Landmarks Law as a "community plan" —a characterization explicitly rejected by the court

[15] In asserting that Penn Central has been left with a reasonable use of the Terminal, appellees and *amici* overlook an essential element of the Court of Appeals decision. The court's conclusion to that effect is limited to the "privately contributed" ingredient of the Terminal's value; it totally disregards the undefined and undefinable portion of the Terminal's value allegedly contributed by organized society. Neither appellees nor the *amici* have attempted to justify this attempted dichotomy between "private" and "social" valuation. The Solicitor General agrees in substance with Penn Central that any such attempted separation is "pointless." (US Br. 21-22 n.18) Unless the social-contribution theory advanced by the Court of Appeals is accepted, its reasonable-use conclusion cannot be sustained.

below (J.S.A. 5)—cannot, in any event, justify its application here. Zoning ordinances upheld by this Court fall into two general categories. In one, the statute divides a municipality into zones and categorizes the types of buildings which may be constructed in each (*e.g.*, residential, industrial, commercial and the like). *See Zahn* v. *Board of Public Works*, 274 U.S. 325 (1927). In the second, the ordinance prescribes physical limitations on structures that might be built (*e.g.*, height limitations, set-back requirements, maximum floor areas, and so on). *See Welch* v. *Swasey*, 214 U.S. 91 (1909). Different combinations of ordinances exist, varying from city to city.[16]

These categories of zoning laws share two important characteristics. First, they are comprehensive; they apply to all property within the jurisdiction of the zoning authority, and "[e]ach property owner in the zone is both benefited and restricted from exploitation." (J.S.A. 4) Second, within whatever restrictions they impose, the landowner is free to develop his property without further control by the zoning authority. For example, in an area zoned "residential," a property owner may build any of a number of different kinds of homes—row houses, bungalows, ramblers, etc. Similarly, within applicable physical limitations, the landowner may use any of a number of architectural plans to achieve the use of the property most desirable to him.

[16] A third category, which restricts certain offensive activities to particular locations, is not pertinent here. *See* Young v. American Mini Theatres, 427 U.S. 50 (1976). Also inapplicable here is a fourth category, which defines what persons may inhabit residential structures. *See* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

The Landmarks Law is quite different. First, as the Court of Appeals said, "[r]estrictions on alteration of individual landmarks are not designed to further a general community plan." (J.S.A. 5) The Law, by definition, applies only to *selected* buildings within the city limits of New York." The Landmarks Commission is statutorily vested with the discretion to protect structures having a "special character" or a "special historical or aesthetic interest." N.Y.C. Admin. Code § 205-1.0 (J.S.A. 76). The Commission is "highly selective in what it designates" as a Landmark, as its Chairman explained. (J.A. 67) On its face, therefore, the Landmarks Laws cannot be said to be "comprehensive." Moreover, "the burden of limitation" is borne solely by the Landmark owner, who receives no corresponding benefit. (J.S.A. 4, 5)

Second, once property has been selected as a landmark, the owner's ability to alter that property is reduced virtually to nothing. Thus, the Landmarks Commission has determined that the facade of Grand Central may not be altered. Moreover, a structure above the facade that would, in the judgment of the Commission, make the Terminal aesthetically less pleasing is also forbidden. Unlike the property owner operating within a zoning ordinance, Penn Central has no free-

[17] The appellees contend that over five hundred buildings have been declared "landmarks." CNY Br. 26. This is surely a trivial number compared with the total number of structures that exist in New York, and it is hardly evidence of comprehensiveness. Moreover, the list of designated landmarks indicates that a very substantial number of the structures are already owned by the City, the State, or the Federal Government—*e.g.*, the Brooklyn Bridge, the Statue of Liberty, the Municipal Asphalt Plant, and the 83rd Police Precinct House and Stable. Landmarks Preservation Commission of the City of New York, "Landmarks and Historic Districts" (1977).

dom to alter its property at all. Even a supporter of the decision below concedes that the operation of the Landmarks Law is a "draconian regulatory program." Costonis, *supra,* 91 *Harv. L. Rev.* at 411.

The National Trust for Historic Preservation explicitly labels the Landmarks Law a "height limitation." National Trust Br. 32. If that were the only restraint imposed by the Law, Penn Central would be free to demolish Grand Central and construct a low-rise office building or department store. Presumably, the appellees would be as disturbed by that possibility as they are at the prospect that Penn Central will construct a high-rise office building over the present structure. The point is clear—the Landmarks Law is not simply a height limitation; it freezes the Terminal in place and gives the public a perpetual right to unimpeded enjoyment of its facade and the air above.

Appellees also rely on cases sustaining the validity of historic-district legislation. CNY Br. 24. Historic-district statutes are, however, highly similar to zoning restrictions: "In each case, owners although burdened by the restrictions also benefit, to some extent, from the furtherance of a general community plan." (J.S.A. 5; *see* PCTC Br. 22-23) The distinction between zoning and historic-district regulation on the one hand, and the designation of particular buildings as landmarks on the other, is important for Due Process Clause analysis. In *Maher* v. *City of New Orleans,* 516 F. 2d 1051 (5th Cir. 1975), *cert. denied,* 426 U.S. 905 (1976), the court of appeals declared that the New Orleans historic-district ordinance "is of general application to a well-defined geographic area." 516 F. 2d at 1061. The court explicitly stated that the purpose of the ordinance was to preserve "the 'tout ensemble' of

the historic French Quarter." *Id.* at 1067. There is no "tout ensemble" at issue here; only the Terminal is frozen in place, while surrounding property owners remain free to alter or develop. In short, as the court below understood, the Landmarks Law does not operate "to further a general community plan." (J.S.A. 5)

Village of Euclid v. *Ambler Realty Co., supra,* and its progeny do not validate all land-use regulations, as appellees appear to assume. Comprehensive community plans are generally valid not because they relate to land use but because they constitute a fair and equitable distribution of the burdens and benefits of governmental regulation. Other attempts at land-use control constitute compensable takings essentially because they fail to meet that test. The Landmarks Law as applied to the Terminal is such a taking because it imposes upon a private property owner the full cost of an improvement in the quality of life that is designed to benefit all who live in and visit NewYork City.

It is plain why the court below relied upon novel and erroneous legal principles in denying Penn Central just compensation. The court realized that legal rules applicable to zoning ordinances simply were immaterial here, because "[t]his is not a zoning case." (J.S.A. 4) In order to uphold the application of the Landmarks Law, the court looked to "the limited purposes of a landmarking statute." (J.S.A. 2-3) Such "limited purposes," however, cannot save the Law, *see* PCTC Br. 20-23, and, as just demonstrated, zoning principles are inapplicable. Thus stripped of the two explanations offered in its defense, the conclusion is clear that the

Landmarks Law has operated to take Penn Central's property interest.

C. A Declaration That the Landmarks Law Was Unconstitutionally Applied Here Is Insufficient; Penn Central Is Entitled to Just Compensation for the Taking of Its Property.

The appellees also argue that even if the Landmarks Law, as applied here, violated the Due Process Clause, Penn Central is nonetheless not entitled to damages or compensation. CNY Br. 37-39. Appellees are incorrect, however, as some of the very cases they rely upon demonstrate.

In *City of Buffalo* v. *J.W. Clement Co.,* 28 N.Y. 2d 241, 269 N.E. 2d 895 (1971), the court below discussed at length the concept of a "*de facto* taking." Such a taking arises where government actions "in effect deprive individuals of full or unimpaired use of their property." *Id.* at 253, 269 N.E. 2d at 902. No physical invasion of the property is required. A *de facto* taking, as in the present case, can be caused by "a legal interference with the physical use, possession or enjoyment of the property." *Id.* at 255, 269 N.E 2d at 903. Grand Central Terminal is subject to the direct legal restraint that its exterior appearance may not be altered. In effect, the right to manage or control any further development of the property has been acquired by the City of New York. In such circumstances, it is plain that a remedy in damages (sometimes referred to as "inverse condemnation") is available to Penn Central. *Charles* v. *Diamond,* 4 N.Y. 2d 318, 329-30, 360 N.E. 2d 1295, 1303 (1977); *Selby Realty Co.* v. *City of San Buenaventura,* 109 Cal. Rptr. 799, 805, 514 P. 2d 111, 117 (Cal. 1973); *see generally* Van Alstyne, "Taking or Damaging by Police Power: The Search for In-

verse Condemnation Criteria," 44 *So. Cal. L. Rev.* 1 (1970)."[18]

The other authorities cited by the City in support of its argument against damages involve comprehensive municipal zoning ordinances whose validity was upheld. *See, e.g., Veling* v. *Ramsey*, 94 N.J. Super. 459, 228 A. 2d 873 (Super. Ct. N.J. 1967). Such decisions are hardly precedential in this case, which does not involve a comprehensive zoning ordinance and which the City concedes, *arguendo* in its discussion of damages, to be invalid.

As a subsidiary point, the appellees argue that because the City did not institute formal condemnation proceedings against the Terminal (a traditional way for government to acquire title to private property), there has been no taking here. CNY Br. 37-38. Apparently the City believes that the form of government action determines whether or not Due Process Clause protections apply. Such a rule would eviscerate the Clause. No government would resort explicitly to eminent domain if it could achieve the same result—without cost—merely by calling its actions an exercise of the police power. Plainly it is the practical, substantive effect of government restrictions on private property that controls here, not the mode by which the government proceeds. *In re Penn Central Transportation*

[18] The State of California cites several cases in which purported exercises of the police power were declared invalid and in which no damages were awarded. Cal. Br. 21-22. The reported opinions in those cases, however, do not specifically state whether the private landowners sought damages or whether they requested only declaratory relief. The cases California relies upon thus provide no support for its argument that compensation need not be awarded here if the Landmarks Law, as applied, is declared unconstitutional.

Company, 384 F. Supp. 895, 939-40 (Spec. Ct. 1974). *See* PCTC Br. 28-33. Whether a taking is *de facto* or *de jure*, it is still a taking for which just compensation must be paid. *Keystone Associates* v. *State*, 371 N.Y.S. 2d 814, 817 (N.Y. Ct. Cl. 1975); *Commissioner of Natural Resources* v. *S. Volpe & Co.*, 206 N.E. 2d 666, 671 (Mass. 1965). The critical point here is that the Landmarks Commission was authorized by the Landmarks Law to take the actions it did affecting Grand Central.[19] *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 632 n. 2 (1952) (Douglas, J., concurring) As this Court has made plain, "the remedy to obtain compensation from the Government is as comprehensive as the requirement of the Constitution." *Yearsley* v. *Ross Construction Co.*, 309 U.S. 18, 22 (1940).

The responsible legislatures in *Causby* and *Griggs*, *supra*, did not decide to take and pay for land adjoining the airports. Nonetheless, when this Court determined that the government actions in both cases constituted a taking, it held the legislatures to the constitutional consequences of those actions, *i.e.*, the payment of just compensation. Here, the City of New York has accomplished directly, not by accident or inadvertence, precisely what it desired with respect to the Grand Central Terminal; *a fortiori*, it too should be held constitutionally responsible for its actions.

Finally, the City makes the policy argument that awarding just compensation for temporary takings would deter local officials from enacting "innovative but untested legislation." CNY Br. 39. But that argument proves too much; the Due Process Clause itself

[19] The City makes no claim of sovereign immunity here.

is designed to function as a deterrent to arbitrary and confiscatory governmental actions. *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 415-16 (1922). The appellees' policy argument is thus nothing more than a repetition of their plea that the protections of the Due Process Clause should be ignored here.

II. THE PRIVATE PROPERTY GUARANTEE IS AN ESSENTIAL PROTECTION AGAINST GOVERNMENTAL ABUSE.

The appellees and their supporting *amici* urge that the preservation of historic landmarks is a task of paramount governmental concern. CNY Br. 8-12, 25-27; National Trust Br. 13-14, 19-22; Committee Br. 31-39. Moreover, they defend the importance of landmark legislation because it benefits the public at large.[20] The City stresses the importance of the "physical environment" to the "economic and cultural life" of New York, and it specifically states that landmark preservation "is necessary to the general welfare of the people." CNY Br. 11, 25.

That argument only demonstrates more convincingly why the protections of the Due Process Clause should be at their highest in this case. It is precisely when a strong public interest asserts itself in the political arena that constitutional guarantees are most in danger, and the protections of a vigilant judiciary most necessary. Moreover, it is precisely because the benefits are enjoyed by the public at large that the

[20] The National Trust claims that Penn Central receives the same benefit as other citizens from having the Terminal frozen in its present form. National Trust Br. 26-27. It is certainly cold comfort to a bankrupt railroad and its creditors that Penn Central owns a fine-looking building which it may never alter.

public at large should bear the costs.[21] And it is precisely because those costs are now borne alone by Penn Central that the Landmarks Law violates Due Process.

As this Court said in *United States* v. *Sponenbarger,* 308 U.S. 256, 266 (1939):

> "The constitutional prohibition against uncompensated taking of private property for public use is grounded upon a conception of the injustice in favoring the public as against an individual property owner."

See also cases cited at PCTC Br. 20-23; *State* v. *Johnson,* 265 A. 2d 711 (Me. 1970). Penn Central does not contend, as the City claims, CNY Br. 26, that the benefits and burdens of all government regulation must be uniform and reciprocal. Rather, it is because the general public receives *all* of the benefits from the Landmark designation while paying *none* of the costs that the Law is discriminatory.[22]

[21] The National Trust was chartered by Congress, in part, "to facilitate public participation" in landmark preservation. 16 U.S.C. § 468. Penn Central agrees that if Grand Central is to be frozen, there *should* be "public participation." The problem with the operation of the Landmarks Law in the present case is that *there is no public participation.* Penn Central bears all the costs. Indeed, the essential claim here is that the public should participate by having the City pay just compensation to Penn Central.

[22] The National Trust devotes an extensive portion of its brief to rebuttal of an argument that Penn Central never made (explicitly or implicitly)—that the Landmarks Law violates the Equal Protection Clause of the Fourteenth Amendment. National Trust Br. 23-28. Penn Central does not contend that all buildings in the city must be designated landmarks, or none. If, however, by such designation the City, as here, eliminates private control over the development of Penn Central's property, then the City must pay just compensation for those restrictions.

Penn Central earlier referred to the statutory framework within which the Landmarks Commission operates: The Law authorizes the Commission to designate as a landmark any structure "which has a special character or special historical or aesthetic interest or value." (J.S.A. 76) Designation is inevitably arbitrary, or at least subjective, because it is basically a matter of taste. Indeed, the Solicitor General concedes that "designation of particular buildings as landmarks may create opportunities for arbitrariness not present in broad-area zoning." US Br. 19.[22] If just compensation were afforded to the property owners affected, however, Penn Central could have no objection, for it is plain that the government may appropriate whatever property it chooses for a valid public purpose. Instead, it is the unchecked power of the Landmarks Commission that is asserted by the appellees that poses the constitutional issue. The owners of "special" structures that are coveted for public use will always be in a small minority at the ballot box and in legislative bodies. Their only protection lies in the enforcement of constitutional guarantees by this Court.

The Due Process Clause, by requiring government to pay when it takes property, necessarily imposes a

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[22] Recognizing this potential for arbitrariness—a fact disregarded by the appellees and the other *amici*—the Solicitor General suggests as a remedy challenging whether the particular landmark designation is appropriate. US Br. 19. Yet that procedure affords no protection at all; given the immense discretion vested in the Landmarks Commission, the courts would be properly reluctant to become arbiters of aesthetic value-judgments.

While the Solicitor General has proposed the wrong remedy, he is eminently correct—and in complete accord with Penn Central's position—that application of the Landmarks Law is fraught with the likelihood of arbitrariness.

discipline upon the sovereign. Should that discipline be removed, it would become easy and commonplace for government to single out individual property owners to bear disproportionate burdens, all for the benefit of society at large. ***Armstrong*** **v.** ***United States, supra,*** **364 U.S. at 49;** ***Pennsylvania Coal Co.*** **v.** ***Mahon, supra,*** **260 U.S. at 416.**

There should be no mistake about the extraordinary breadth of the claim made by the appellees. They are asserting that the City (or any other governmental entity) has a constitutional right to keep Grand Central as it is for the benefit of the public, while paying none of the costs. If that claim is upheld, then the language of the Constitution—"nor shall private property be taken for public use, without just compensation"—will itself have become an historical landmark, a mere curiosity of little further usefulness.

CONCLUSION

This Court should reverse the decision of the court below, declare the application of the Landmarks Law to Grand Central Terminal to have been a taking of private property for public use, and remand, with costs, for determination of the amount of just compensation to be paid Penn Central.

Respectfully submitted,

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